No. 10035

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

F. C. LESLIE and
NEWLIN & ASHBURN,
1020 Edison Building, Los Angeles,
Attorneys for Appellant.

F. C. LESLIE,
RAY J. COLEMAN,
HUDSON B. COX,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

MISCELLANEOUS.

STATUTES.

TEXTBOOKS.

No. 10035

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.[1]

The Government's brief filed in this cause consists of four main points. Two of them purport to respond, in part at least, to the burden of our opening brief; the other two raise new points not discussed in our opening brief because they were issues upon which the trial court found in appellant's favor. It is apparent, therefore, that the decision of the trial court wholly pleased neither the taxpayer nor the Government.

We will dwell, herein, briefly upon those points, numbers I and III of the Government's brief, wherein answer is sought to be made to certain of the grounds for reversal urged by us in our opening brief; we will then turn to the new points, numbers II and IV, wherein it is contended by counsel for the United States that the trial court fell into error in deciding adversely to the Government the issues therein presented.

---

[1]The correct citation of *Arkwright Mills v. Commissioner*, quoted at p. 73 of our opening brief is 127 Fed. (2d) 465.

I.

Revised Statutes, Section 3477, Does Not Invalidate Assignments by Operation of Law Pursuant to Dissolution.

In considering this point we cannot do better than rely upon the record itself; the very simple facts are, as disclosed in the record and indeed in the Stipulation of Facts itself [Tr. pp. 80-92], that the Pacific Goodrich Rubber Company had a claim against the Government for additional and excess manufacturer's excise tax, in the amount of $16,450.39, which had been "erroneously, illegally and unjustly demanded and collected" from it [Conclusion of Law II, Tr. p. 154]; that it had but one stockholder, the Appellant herein [Stip. of Facts, Tr. p. 82]; that on June 30, 1934, it made an assignment to its parent and sole stockholder [Stip. of Facts, Tr. p. 83] of all of its assets including this right of refund; [Exhibit A, Tr. pp. 191-192]; that at a special meeting of its Board of Directors held on July 6th, 1934, as shown by certified copy of the minutes thereof,[1] it was resolved to dissolve the corporation and the delivery to Appellant of all of the assets of the corporation was ratified "as a distribution in kind to the stockholders of all the assets of this corporation" [Exhibit I, Tr. pp. 226-228]; that on the same day at a meeting of the stockholders it was recited that the corporation had transferred and delivered over to Appellant at the close of business on June 30, 1934 all of its assets *"in anticipation of the immediate*

---

[1]Certified copies of the minutes of a corporation are *prima facie* evidence "of the facts or action stated therein." *Calif. Civil Code* Sec. 371; *People v. Ratliff*, 131 Cal. App. 763, 773; 22 Pac. (2d) 245; *Thermopolis N. W. Electric Co. v. Ireland* (10th C. C. A.), 119 Fed. (2d) 409, 411.

dissolution of the company" [Tr. p. 230]; that the stockholders thereupon voted to dissolve and ratified the transfer and delivery of the assets "as a distribution in kind of all the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company." [Exhibit I-1, Tr. pp. 229-231]; that the corporation thereafter and on December 21, 1934 was formally dissolved [Stip. of Facts, Tr. p. 81].

When we recall that these certified copies of minutes, which the court found to be true and correct [Findings XIII and XIV, Tr. p. 147], are affirmative and probative evidence,[1] standing uncontradicted in the record, concerning the reason for and the nature of the assignment of June 30, 1934, we are not remiss in taking issue with Appellee when it so bluntly states "the first assignment, made six months before Pacific's dissolution, could not have been a distribution according to the resolutions of the directors and stockholders pursuant to dissolution," and "was merely a voluntary assignment for a consideration,[2] having no possible relation to the subsequent dissolution" (Gov't. Br. p. 21). The unsupported statement of the advocate cannot substitute for the record.

---

[1]See preceding footnote.

[2]The recital of consideration in the assignment betokens nothing; it clearly was not a monetary consideration because the assignment itself was of all assets of the Pacific Company including cash, bank accounts and receivables; being a distribution in anticipation of immediate dissolution the consideraton, if any, would be the surrender by the sole stockholder of its stock for cancellation. As stated in 16 Fletcher Cyc. of Corps., §8224, p. 1038:

"A corporation may, before formal dissolution and while it still has a corporate existence, distribute its property and assets among its stockholders."

When counsel say (Gov't. Br. pp. 24-25), "But taxpayer herein is not shown to have been the actual successor to Pacific's claim against the United States other than by the statements in totally unrelated abatement claim which it filed in Akron, Ohio" they apparently choose completely to ignore the uncontradicted evidence in the record. The so-called "totally unrelated" claim to which they make reference [Tr. p. 239] was but further corroboration of the fact that the much maligned assignment was one step in the dissolution of the taxpayer and the distribution of its assets to its stockholder, the Appellant.

We will not requote the decisions, of which only a handfull of the more pertinent are included in our opening brief at pages 24 to 33 thereof; suffice it to remark here that the authorities are uniform in holding that a distribution (be it in the form of an assignment or otherwise) pursuant to a dissolution, like a transfer upon a merger or consolidation, is not that form of traffic in claims against the Government which R. S. §3477 was designed to prohibit.

See:

Goodman v. Niblack (O. B.[1] pp. 24-25);

Novo Trading Co. v. Commissioner (O. B. pp. 26-28);

Roomberg v. United States (O. B. pp. 28-30);

Seaboard Airline Ry. v. United States (O. B. pp. 30-31);

Phillips, Collector v. Howe Films Co. (O. B. p. 31);

Kingan & Co. v. United States (O. B. pp. 32-33);

Sherwood v. United States (2nd C. C. A.) 112 Fed. (2nd), 587, 592;

Butler v. Goreley, 146 U. S. 303, 36 L. Ed. 981, 986.

---

[1]Opening brief.

And counsel for Appellee make no serious answer to the irrefutable alternative: if perchance the assignment was in fact null and void because within the prohibition of R. S. §3477 (which the record and the authorities above cited belie) then assuredly upon the dissolution of the Pacific Company this sole remaining asset would have passed to its stockholder, the Appellant herein, by operation of corporate law. See the authorities cited and quoted at pages 19 to 24 of our Opening Brief. Counsel for the Government, without the benefit of anything other than their own unqualified statement therefor, after observing that the assignment was "absolutely null and void" (R. S. §3477), state that it was "effective as between the parties to give the taxpayer the right of any potential chose in action against the United States so that the subsequent dissolution did not distribute this claim in kind" (Gov't Br. p. 21). Such a statement ignores the law (See *Spofford v. Kirk,* cited in footnote 2 at O. B. p. 18 and *National Bank of Commerce v. Downie,* 218 U. S. 345, 54 L. Ed. 1065) and ignores common sense. If, as R. S. §3477 holds, an assignee of a claim against the United States acquires no rights thereunder clearly nothing passes to him by a purported assignment and if nothing passes the claim remains where it was, an asset in the hands of the original claimant, which would then pass by operation of law to its stockholders on dissolution. "Accordingly, we may ignore the assignment by Durso to the surety and regard only the assignment which, on account of the situation of the parties, the law has effected." (*Morgenthau v. Fidelity & Deposit Co.*, 94 Fed. (2d) 632, 636. See O. B. pp. 23-24.)

II.

That the Additional Tax Was Not Added to the Price of the Tires With Respect to Which It Was Imposed or Collected From the Purchasers Thereof Was Properly and Sufficiently Established.

In point III of the Government's brief counsel seek in seven pages and five footnotes to answer three out of the four grounds urged by us for reversal of the decree below.

The Additional Tax Could Not Have Been Added to the Price or Collected From the Purchasers.

It is said upon page 35 that Appellant is not entitled to recover in the absence of proof that the Pacific Company did not pass the taxes in question on to its vendees. Apart from the fact that this is a departure from the Statute (Section 621(d), Revenue Act of 1932, 26 U. S. C. A. §3343d) which requires proof not that the tax was not "passed on" but rather *that the taxpayer has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee,*"[1] we have no particular quarrel with counsel's statement. But as we looked to the record to determine the nature of the assignment discussed in point I above, let us look to the record again to see whether or not this additional manufacturer's excise tax was or *could have been* included in the price of the tires upon

---

[1]All italics ours unless otherwise indicated.

the sale of which it was imposed. The tires in question as found by the court, "were sold and billed to the purchasers * * * long before demand was made upon said company that it pay an additional manufacturer's excise tax" thereon [Finding XXII, Tr. p. 152] and at a time when neither "Pacific Goodrich Rubber Company or plaintiff contemplate(d) that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax." [Finding XXII, Tr. p. 151.] As if to make assurance doubly sure, the court further found "that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them [Finding XXII, Tr. p. 152].

What better, what more conclusive proof that the additional tax was not "passed on," as counsel has it, could be adduced than the inevitable conclusion flowing from this chronology. This finding number XXII,[1] based as it is upon the stipulated evidence [Stip. of Facts, Tr. pp. 90-92], is so significant, so at odds with the conclusion of the court [Conclusion VII, Tr. p. 156], that we are setting it out verbatim in an appendix hereto.

As the Government's brief ignores the cogent significance of this factual proof so likewise does it ignore the pertinency and persuasive effect of those cases quoted by us at O. B., pages 38 to 42, where under similar circumstances the courts have held it *impossible* for the tax to have been added to the price where the sales antedated

---

[1]Findings of fact are binding upon an Appellate Court unless clearly erroneous. Fed. Rules of Civ. Proc. Rule 52.

the tax and the tax itself was not in contemplation by the taxpayer.

Meeting with eloquent silence the almost conclusive effect of this sequence of events and the trial court's finding on the evidence, the Government's brief contents itself with urging anew that the taxpayer failed to produce its books of account and sales records. As this ground of objection has been quite exhaustively pursued in our Opening Brief at pages 43 to 55, we will content ourselves by referring again to those pages and to the last point of our Opening Brief (pages 69 to 74) wherein we urged that if more meticulous proof were in fact required the trial court abused its discretion in refusing permission to reopen.

Cases cited by counsel at Gov't. Br. p. 38 apparently for the proposition that verbal testimony in lieu of books and records is insufficient to establish that a tax has not been passed on are none of them even remotely in point, except *Duradene v. Magruder,* which curiously enough strongly supports our position that documentary evidence is not essential and was quoted from by us at O. B. p. 54. For the rest, the cases cited involved for the most part claims for refund under the A. A. A., were cases wherein the sales were made *after* the liability for the tax was known and, as found by the court in the respective cases, the taxpayer had increased his prices concurrently with the tax in an amount more than sufficient to cover the tax increase.

APPELLANT IS NOT PREVENTED FROM ESTABLISHING THAT THE TAX WAS NOT PASSED ON.

Devoting one page of its brief thereto (pages 34-35), the Government contends that as Appellant is not "the person who paid the tax" *it is not entitled to maintain the action.* That, however, is not what the Statute says; rather it provides that no overpayment of tax under Chapter 209 of the Revenue Act of 1932 shall be refunded unless *the person who paid the tax establishes* that he has not included the tax in the price of the article with respect to which it was imposed. It is not a question of right to maintain the action (that question is raised, if at all, by the effect to be given R. S. §3477)[1] but is rather a requirement that the taxpayer establish that the tax has not been passed on.[2] Hence it is that the cases cited at pages 34 and 35 of the Government's brief have no pertinency whatsoever to the real issue, to wit: can appellant as successor in interest of the Pacific Company (the "person who paid the tax") establish the facts required to be shown to entitle it to a refund under Section 621(d) of the Revenue Act of 1932 (26 U. S. C. A. §3343(d)). See in this connection Point III of our Opening Brief (pages 56 to 68) and the authorities therein referred to.

Of the cases cited by the Government, *Cowpens Mfg. Co. v. United States* (D. C. So. Car.) 15 A. F. T. R. 794

---

[1]Not to be overlooked is the fact that the *right to refund* of erroneously or illegally collected taxes is conferred by a separate and distinct statutory authority, R. S. 3220 (26 U. S. C. A. §3770(a)(1)) which in no sense limits the right of recovery to "the person who paid the tax"; see Opening Brief, pp. 67 and 68.

[2]We use the term only for brevity.

(Gov't Br., p. 34) involved not a consideration of Section 621(d) but of R. S. Section 3477 and raised only the question as to whether an assignee of the taxpayer *could maintain the action* for refund. The court there stated that a sale of the assets of a corporation and subsequent dissolution would not convey to the purchaser a claim against the United States because under the corporation law of South Carolina the liquidating trustees of the dissolved corporation were the proper parties to sue. Note how different is the instant case wherein there was not a sale of its assets by the Pacific Company to an outside third party purchaser but a distribution to its sole stockholder pursuant to dissolution.

Dalton Foundries v. United States (Ct. Cl.) 56 Fed. (2nd) 483 (Gov't. Br., p. 34) similarly involved *a sale* of corporate assets to an outside purchaser including a claim for refund against the United States which the court held to be within the prohibition of R. S. Sec. 3477.

We have no quarrel with the other cases cited by counsel on pages 34 and 35 of the Government's brief except that their pertinency to the case at bar is by no means apparent as is seen by the parenthetical comments made thereon by Government counsel.

In footnotes 16 and 17 on page 33 of the Government's brief counsel has inexcusably misconstrued our opening brief. We there pointed out (O. B. pp. 57-59) that substantially similar language in the Revenue Act of 1936 (Secs. 902 and 903) permitting refunds under the Agricultural Adjustment Act had been construed by the courts and, indeed by the Bureau of Internal Revenue itself as permitting a transferee of the taxpayer (as opposed to

the taxpayer itself) to prove that the tax had not been passed on to the vendees of the taxpayer. But says counsel in the footnotes in question, that Act and the authorities under it can have no application because we are not proceeding herein pursuant to that Revenue Act but pursuant to Sec. 621(d) of the Revenue Act of 1932. We readily grant the fact, but the persuasive analogy afforded both by the Bureau of Internal Revenue and the courts upon the interpretation to be given "substantially the same requirements" (Govt. Br., p. 33, footnote 16) in a later act affords a valuable precedent for the construction to be placed upon the requirements of Section 621(d).

III.

The Grounds Alleged as a Basis for the Refund of These Taxes in the Claims Filed and in the Complaint at Bar Are Identical. If There Be Any Variance the Government Waived its Right to Object.

Point II of the Government's brief presents a new issue in this cause. The United States complains of the decision of the trial court in concluding that in so far as there was any variance between the claims for refund filed with the Commissioner and the allegations of the First Amended Petition, the Commissioner by rejecting the claims upon the merits waived any technical variance [Conclusions of the Court on the Merits of the Action, Tr. pp. 102-103].

Although counsel in the Government's brief urges with considerable emphasis that the "grounds first advanced in the amended petition * * were new, unrelated and materially and fatally different from those included in its claim for refund" (Gov't. Br., p. 27), the only difference that can be pointed to is the fact that in the claims for refund filed by Appellant it set forth the assignment to it of June 30, 1934, but said nothing therein about the assignment having been made to it as sole stockholder of the Pacific Company pursuant to the dissolution of that company. In its First Amended Petition [Tr., pp. 50-77], which the court will recall was filed pursuant to a stipulation between the parties [Tr. pp. 78-79][1],

---

[1]"It is hereby stipulated * * * (a) That the petition and the amendment to the petition on file in the above entitled action may be amended in the particulars as set forth in Plaintiff's First Amended Petition presented herewith." [Tr. p. 78.]

Appellant elaborated upon the nature of and the circumstances surrounding the assignment and affirmatively alleged that it was made as and in evidence of a distribution of its assets in kind by the Pacific Company to Appellant, its sole stockholder [Tr. pp. 51-54]. The grounds upon which refund of the additional manufacturer's excise tax was claimed were in each instance identical, the sole difference lying in the greater elaboration contained in the complaint concerning the nature of the assignment made to the Appellant. As the fact of the assignment and the grounds upon which the refund was claimed appeared in the claims filed and the Commissioner was duly apprized thereof, we see no occasion for invoking any doctrine of waiver.

However, if there be any difference at all between the claims filed and the grounds urged for recovery of this tax in the First Amended Petition (and we are frankly unable to see any such different *grounds* for refund in the two documents) the Government has most assuredly waived its right to complain on that score, as the trial court concluded in its Opinion [Tr. pp. 102-103]. The Commissioner "rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of Section 9a of the Agricultural Adjustment Act" [Opinion of the Trial Court, Tr. p. 103, Finding XX, Tr. p. 150; see also the admission of counsel in the Government's Brief, page 39].[1] The Government stipulated

---

[1]Counsel's assertion (Govt. Br. p. 31) that there could be no waiver because the Commissioner had not been apprized of the fact that the assignment was made pursuant to dissolution of the taxpayer and as a distribution of all assets to its sole stockholder is a manifest *non sequitur*. So far as appeared from the face of the claims (until explained in greater elaboration by the First Amended Petition [Tr. pp. 51-56]) the assignment relied upon was apparently in violation of R. S. Sec. 3477 yet the Commissioner chose to reject the claims upon the merits; the fact of the assignment appearing on the face of the claim necessarily presented to the Commissioner the issue of its validity as well as the strict merits of the claim itself, the same issues which were subsequently presented to the Court for determination.

that this amended complaint, elaborating upon the nature of the assignment (and, if need be, *adding* this so-called "entirely different ground" for refund) might be made and filed [Tr. p. 78]. It raised no objection to any purported variance by way of affirmative defense or otherwise in its answer [Tr. pp. 41-48]. It admitted, by failure to deny paragraphs VIII and IX of the amended complaint, that claims for refund in the form presented to the Commissioner had in fact been "duly filed" [Tr. pp. 58, 64]. There is no Finding of Fact or Conclusion of Law covering the alleged variance between the claim and the complaint and, as appears from the record herein, this ground of objection was neither presented nor urged by the Government in the trial court but is raised by it for the first time here on appeal [see Transcript, particularly p. 261 showing cause submitted on briefs rather than oral argument and note that the trial briefs on file herein make no mention of this ground of objection]. Finally, as counsel for the Government hopefully remarks in their brief, the time has long since expired when amended or more elaborate claims for refund might be filed. (Gov't. Br., p. 28.)

Taken together or singly, these facts, the examination and rejection of the claims upon the merits, the stipulation for the filing of the amended complaint and the failure to raise or present the issue in the trial court, spell out a clear case of waiver of compliance with the Regulation, if indeed waiver need be relied upon at all.

Tucker v. Alexander, 275 U. S. 228, 72 L. Ed. 253, 256:

> "If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously

he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

Bethlehem Baking Co. v. U. S. (3rd C. C. A.) June 26, 1942 (1942 P. H. Fed. Tax Service, Par. 62,861):

"The examination and consideration of the claim on its merits constituted a waiver by the Commissioner of any objection as to the form of the submission. Cudahy Packing Co. v. United States, 37 F. Supp. 563, 570 (N. D. Ill.) reversed on other grounds, 126 F. (2d) 429 (C. C. A. 7)."

Con-Rod Exchange, Inc. v. Hendrickson, Collector (D. C. Wash.), 27 Fed. Supp. 427, 428:

"The Commissioner's consideration and denial of the claim, being upon the merits, constituted a waiver of the informality of plaintiff's claim in failing to comply with the Commissioner's regulation in the foregoing respect."

S. & R. Grinding Co. v. United States (D. C. Pa.), 27 Fed. Supp. 429, 430:

"The claims for refund were rejected on the merits, because the Commissioner found the plaintiff was liable for the tax, and not because the plaintiff had failed to allege in its claims for refund that the taxes paid were not included in the price of the articles sold, and were not collected from the vendees. See letters of the Commissioner rejecting the

claims [Exhibits III and IV] attached to the complaint.

"In that situation, we hold the Commissioner waived any departmental regulation requiring that claims for refund show the plaintiff had not included the tax in the price of the articles sold or collected the same from the vendee."

University Distributing Co. v. United States, (D. C. Mass.) 22 Fed. Supp. 794, 800; *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62, 71; 77 L. Ed. 619, 625; *United States v. Garbutt Oil Co.,* 302 U. S. 528, 533; 82 L. Ed. 405, 409.

Furthermore, having failed to present this issue in any manner in the trial court (the consideration of the point in his opinion by the trial judge was purely *in invitum*), the Government has waived its right to complain and may not raise the question for the first time on appeal.

6 Cyc. of Fed. Proc. §2973 p. 580:

"Not only is review restricted to the judgment appealed from, but it is further restricted to such questions and issues as were made and considered below and there decided." (See cases cited.)

Ex parte Keizo Kamiyama (9th C. C. A.) 44 Fed. (2nd) 503, 505:

"It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court."

Hormel v. Helvering, 312 U. S. 552, 556; 85 L. Ed. 1037, 1041.

IV.

The Exemption From Double Taxation Provided for in Section 9(a) of the Agricultural Adjustment Act Applies to the Tax Levied Under Section 16 as Well as to That Levied Under Section 9.

The fourth point of the Government's brief, admittedly presented by it only as an alternative ground of argument (Gov't. br., p. 40), is devoted to an attack upon Conclusion of Law I to be found at Transcript page 153. Therein the trial court concluded that under the proviso clause of Section 9(a) of the Agricultural Adjustment Act (7 U. S. C. A. §609(a))[1] the manufacturer's excise tax on tires imposed by Section 602 of the Revenue Act of 1932 (26 U. S. C. A. §3400) should be computed on the basis of the weight of said tires less the weight of the processed cotton therein on which either the tax imposed by Section 9(a) or the equivalent tax imposed by Section 16(a) of the Agricultural Adjustment Act had been paid. The bases for the trial court's conclusion are to be found in its opinion at Transcript pages 98 to 100. The Government urges that the proviso clause in Section 9(a) of the Agricultural Act is strictly limited to the tax levied under that section and has no application to the equivalent and counterpart tax levied under Section 16 of the Act.

---

[1]"Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished articles less the weight of the processed cotton contained therein on which a processing tax has been paid."

Section 9(a) was the first section of the Act levying any tax for the purposes designed to be accomplished by the Agricultural Adjustment Act. The section stated:

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided."

And at the end thereof was the proviso quoted in Footnote 1.

Section 15(e) of the Act levied upon commodities imported into the United States, during "any period for which a processing tax is in effect," a tax "*equal to the amount of the processing tax* in effect with respect to domestic processing of such commodity into such an article at the time of importation."

Section 16(a) of the Act (7 U. S. C. A. §616(a)) levied a tax, not named or defined in the section, upon any commodity held for sale or other disposition at the time when the processing tax first became effective as to such commodity, which tax was to be *the equivalent of the processing tax* which would have been payable had the commodity in question been processed on that date. Although not named or defined in the Act this last mentioned tax has for purposes of differentiation and convenience been commonly designated as the "floor stocks" tax.[1] It should be borne in mind, however, that Congress when it enacted the Agricultural Adjustment Act on May 12, 1933, made no such facile distinction between the

---

[1]"The undefined but so-called floor stocks tax" as counsel for the Government express it. (Gov't. Br. p. 42.)

levies. Indeed were it not for the label, "floor stocks tax," which usage has subsequently appended to the levy made under Section 16, there can be little question that Congress in employing the term "*processing taxes*" in Section 9(a) above quoted (* * "there shall be levied *processing taxes* as hereinafter provided.") clearly used it in the broad sense as inclusive of all equivalent levies made under the Act including the "compensating" tax on imports and the so-called "floor stocks" tax on commodities on hand.

Thus the Senate Committee on Agriculture and Forestry in reporting the bill (H. R. 3835) to the Senate on April 5, 1933, the bill then containing provisions for the so-called "compensating" tax and "floor stocks" tax, stated, "In order to obtain funds to pay the farmer for lands thus leased, it is proposed under the leasing provision of this part[2] to levy and collect what is known as a *processing tax* from the processor of farm products." (Senate Reports on Public Bills, 73rd Congress; Report No. 16.) It is significant that no mention was made in the report of the so-called "compensating tax" and "floor stocks" tax and that all tax levies under the Act were treated in the aggregate as "a processing tax."

Unjust Discrimination Would Result From Appellee's Suggested Restriction.

Furthermore, it is apparent from a consideration of these three taxing provisions in the Act that Congress sought assiduously to equalize the burden of the tax so

---

[2]Title I.

that no class, processors, importers or persons with large stocks of goods on hand would be discriminated against or in favor of when the Secretary of Agriculture should proclaim the tax in effect with respect to any particular agricultural commodity.

This purpose appears from the report of the Committee on Agriculture of the House dated March 20, 1933, wherein there was included in the bill for the first time the forerunner of what subsequently became Section 16(a). On page 5 of this Report under a heading "Supplemental Revenue Provisions" (House Reports on Public Bills, 73rd Congress; Report No. 6), the Committee stated:

> "In order to make effective the operation of the tax provisions and to *prevent unfair discriminations* resulting therefrom, certain supplemental revenue provisions are included in the bill. These are as follows: * * *
>
> "(c) There is levied upon floor stocks, when the processing tax first goes into effect with respect to any commodity, a tax equal to the processing tax which would have been payable with respect to the commodity from which the floor stocks are processed if their processing had occurred when the processing tax was in effect. A corresponding refund is provided on floor stocks when the processing tax finally terminates. * * *
>
> *"The above supplemental revenue provisions serve * * * to prevent unfair competition within any industry."*

It appears again in a report upon the Revenue Bill of 1936 wherein the Committee on Ways and Means stated:

> "The Agricultural Adjustment Act provided for a floor-stocks tax on the effective date of the processing tax *in order that all articles, the product of a commodity subject to the processing tax, should move into the channels of trade equally taxed.*" (House Report No. 2475 dated April 12, 1936; 1939-1 Cum. Bull. Part 2, page 677.)

With this intent on the part of the Congress to avoid any unjust discrimination evidenced so unmistakably, it argues strange for the Government now to seek a construction of the Act which would be patently discriminatory between large groups of persons in the same class. If the proviso clause in Section 9(a) be as strictly limited in its application as counsel urges those tire manufacturers, for example, who had a large inventory of cotton on hand on August 1st, 1933 would be required to pay an additional tax of 2¼ cents per pound thereon when they sold their tires as against the manufacturers whose inventories were low on August 1st, 1933 and into whose tires went only cotton on which the particular tax levied under Section 9 as opposed to Section 16 had been paid. To illustrate: the one class of manufacturers, counsel urges in effect, would be entitled to compute their manufacturer's sales tax on the weight of the tires sold less the weight of the processed cotton therein; the other class of manufacturers, having any considerable stock of cotton on hand on August 1st, 1933, upon which incidentally, they would have paid an identically equivalent tax (approximately 4½ cents per pound) under Section 16 of the Agricul-

tural Adjustment Act as their competitors would have paid under Section 9, would find themselves in the unenviable position of paying still another levy of 2¼ cents per pound on this same cotton under the Manufacturer's Excise Tax of 1932 while their competitors escaped free. We cannot ascribe to Congress an intent to discriminate thus between persons in the same class when the attempt to avoid all such discrimination in the Act is so clearly manifest.

United States v. American Trucking Ass'n., 310 U. S. 534, 543; 84 L. Ed. 1345, 1351:

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

Ozawa v. United States, 260 U. S. 178, 194, 67 L. Ed. 199, 207:

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Helvering v. Morgan's Inc., 293 U. S. 121, 126, 79 L. Ed. 232, 236:

> "But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part." (*Helvering v. New York Trust Co.*, 292 U. S. 455, 464; 78 L. Ed. 1361, 1366.)

The language of the trial court in its opinion cannot, we believe, be improved upon in this connection and we take the liberty of quoting briefly therefrom to this court:

> "In my opinion, an examination of Title I of the Agricultural Adjustment Act with the aid and in the light of the correlative legislative history and material which led up to this remedial law, clearly shows the error and injustice of the contention that the deduction computation provided in Section 9 is inapplicable to the unnamed tax imposed by Section 16, or that deductions under Section 9 should be confined to specifically defined 'processing' taxes according to the letter of the law. To so restrict the application of Section 9a would utterly destroy the chief factor present in the legislative mind in making omnibus provisions to prevent tax discrimination between tire manufacturers without any real differentiation of business activity in or use of fabricated commodities. See United States v. Dickerson, 310 U. S. 554. * * *
>
> "To construe the refund or credit provisions of the Triple A so as to include the so-called 'floor stock' taxes as well as the statutorily defined 'processing'

taxes instead of adding 'something entirely new to the meaning of the word "processing," as it is used' in the statutes, as argued by the Government, merely sheds light upon what appears from reading the whole of Title I to have been the painstaking purpose of Congress—namely, the prevention of discrimination and double taxation." [Tr. pp. 98-99.]

A Statute in Avoidance of Double Taxation Is to be Liberally Construed.

Much is said in the Government's brief about what counsel variously terms the "credit," the "exemption" or the "deduction" permitted under the proviso clause of Section 9a and cases are cited to the effect that credits and deductions from gross income, being matters of Legislative grace, are to be strictly construed against the taxpayer. (Gov't. Br. pp. 42-43.) But the proviso in question is clearly neither a credit nor a deduction. It provides that in computing the manufacturer's sales tax, imposed under another and different Act, one may exclude from the weight of the article sold the weight of processed cotton contained therein on which a processing tax has been paid. The proviso is properly in the nature of an exemption granted under the terms of a later statute expressly to avoid double taxation upon the same commodity by virtue of an earlier Act. Designed, as it manifestly is, to avoid double taxation it should receive not the strict construction applicable to credits and deductions from gross income under the Revenue Acts (as witness the cases cited by Gov't Br. pp. 42-43) but a liberal construction to effectuate the purpose of the Congress.

61 *Corpus Juris*, "Taxation" §71, p. 139:

> "The presumption is against the intention of the legislature to impose double taxation on the same property, and prevails unless overcome by the express words of the statute. Any construction of a taxing statute which results in taxation of the same property twice is to be avoided if possible, and never to be adopted unless necessary to effect the manifest intent of the legislature;"

Tennessee v. Whitworth, 117 U. S. 129; 29 L. Ed. 830, 832:

> "Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all; and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition."

United States v. Supplee-Biddle Hardware Company, 265 U. S. 189, 195; 68 L. Ed. 970, 975:

> "The result of the construction put by the Government upon §§233, 230, and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000.—*i. e.*, an income tax and an estate tax. Such a duplication even in an exigent war-tax measure, is to be avoided unless required by express words."

Helvering v. Bliss, 293 U. S. 144, 150; 79 L. Ed. 246, 251:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

The trial court in its opinion expressed the same thought when it said:

> "We have been unable to find from an analysis of the applicable tax statutes any reason why the Congress should desire to relieve the manufacturers of the burden of double taxation where one tax is a processing tax and the other is a sales tax and not to relieve the same manufacturers of double taxation when one of the taxes is a so-called 'floor stock tax' and the other is a sales tax; therefore, the danger of going beyond the literal interpretation of a taxing statute, adverted to in United States v. American Trucking Assn., *supra,* is not present in the consideration of the tax legislation pertinent to this action." [Tr. p. 99.]

We conclude therefore that Congress in employing the term "processing tax" in the proviso clause of section 9(a) used the term in the general sense as including not alone the tax on "processing" but also the undefined and similar levy made under Section 16(a) on stocks on hand and that this must necessarily be so to avoid a clear and unjust discrimination and to give effect to the obvious intent to avoid a double tax upon the same commodity.

CONCLUSION.

In urging a reversal of the judgment appealed from we would emphasize again that the decision so far as concerns the merits was in favor of the taxpayer; it found that the additional manufacturer's excise tax was unjustly and improperly demanded and collected; that the taxpayer was properly entitled to deduct from the weight of its tires sold the weight of processed cotton therein on which it had paid a tax under the AAA. Judgment was, however, rendered in favor of the Government upon what we believe to be technical and erroneous grounds: (a) that the assignment of this claim for refund was void under Rev. Stat. §3477 (but the uncontroverted evidence showed that the assignment was but part of a distribution of all assets of the taxpayer to its sole stockholder pursuant to dissolution, a well recognized exception to the statute); (b) that the books and records were not produced to show that the additional tax was not passed on (but the court's finding that the tires were all sold before the additional tax was even in contemplation by the taxpayer proved that this extra tax could not have been added to their price); and (c) that appellant because it was not "the person who paid the tax" could not establish the facts required to be shown under Section 621(d) (but the authorities have uniformly permitted a transferee of the taxpayer to establish that a tax has not been passed on and have classified a transferee of the taxpayer as the taxpayer himself for such purposes).

We believe, therefore, that the judgment cannot properly stand and that the $16,450.39 "erroneously, illegally and unjustly demanded and collected" should be ordered refunded with interest.[1]

Respectfully submitted,

F. C. Leslie and
Newlin & Ashburn,
Attorneys for Appellant.

F. C. Leslie,
Ray J. Coleman,
Hudson B. Cox,
Of Counsel.

---

[1]Interest is allowable: *Carter v. Liquid Carbonic Pac. Co.* (9th C. C. A.) 97 Fed. (2d) 1, 5; in any event, it is allowable at the rate of 6% per annum from Oct. 1st, 1935; Sec. 621(c) Rev. Act of 1935; 26 U. S. C. A. §3443(c).

APPENDIX.

Finding of Fact XXII [Tr. pp. 151-152].

That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9(a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9(a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to $0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933, were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.